IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 42

JOHN W. WEBB,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF ON THE MERITS.

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CITATIONS.

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BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (R. 141) is reported in 228 F. 2d 257 (7 Cir. 1955).

JURISDICTION.

The judgment of the Court of Appeals was entered on December 29, 1955. Petition for Rehearing was denied by that Court on January 30, 1956.

On March 8, 1956, the petition for a writ of certiorari was filed and was granted April 23, 1956. The jurisdiction of this Court is found in 62 Stat. 928, 28 U.S. Code, Section 1254 (1).

QUESTIONS PRESENTED.

By Petitioner:

Question I.

In order to prevail under the Federal Employers' Liability Act, need a plaintiff negate all possible inferences of negligence of persons other than the defendant and prove his case by a standard of "probabilities"?

Question II.

Does a Court of Appeals invade the province of a jury and violate the scope of appellate review in a Federal Employers' Liability Act case by setting aside an employee's jury verdict and judgment and directing entry of final judgment for the railroad when the record shows that:

> The Employee stepped on a large clinker buried near a switch stand in a soft, new roadbed constructed by the railroad about three weeks before the accident; the railroad's firemen cleaned their fireboxes at this location; the employee's duties required him to work on the ground at this point and the employee and the employer's witnesses testified that a clinker as described made for bad footing and an unsafe place to work?

By Respondent:

Question I.

Whether or not in a suit brought under the Federal Employers' Liability Act, the burden of proof remains upon the plaintiff to produce probative facts that the defendant knew, or in the exercise of reasonable care should have known, of the presence of an object, foreign to a roadbed, upon its premises.

Question II.

Whether in the absence of such proof, as found by the Court of Appeals, it can properly reverse the verdict and judgment entered in the trial court against the defendant and direct that judgment be entered for the defendant.

STATUTE INVOLVED.

The Federal Employers' Liability Act (35 Stat. 65; 45 U.S. Code, Sec. 51) (hereinafter for the sake of brevity referred to as the F.E.L.A.) provides:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or

closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65, Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404. 45 U.S. Code, Sec. 51.

STATEMENT.

This action was brought by Petitioner, against the Respondent, under the Federal Employers' Liability Act, (35 Stat. 65, 45 U.S. Code, Secs. 51-60) to recover damages for injuries suffered by him as a result of the alleged negligence of his employer. (R. 3-5) He charged in his complaint that the defendant failed to use ordinary care to furnish him with a reasonably safe place to work and thereby he sustained injuries. (R. 4) The defendant's answer denied that it was guilty of any negligence and alleged that plaintiff's own negligence was the sole cause of, or a contributing cause to his injuries. (R. 6, 7) The parties stipulated that they were both engaged in interstate commerce at the time in question. (R. 8)

Around the middle of June, 1952, certain repairs had been made by Respondent on its house track at Mount Olive, Illinois. (R. 68) This work included raising the rail and ties about 5 inches above their previous level and the use of about 15 cubic yards of new cinder and chat ballast. (R. 72, 73) During the repairs, the house track was closed for use by the trainmen. (R. 67)

About three weeks after the repair work (July 2, 1952) when uncoupling a car on this house track, Petitioner observed a leaking grain car. He was then about 15 feet

south of the house track switch on the east side of the track. He turned around to go to the caboose to get some waste to use as a plug and stepped on a large buried clinker. (P. Ex. 2, R. 65, 111) He did not notice the clinker on top of the roadbed. (R. 15) He had looked at the ground before stepping and it was level, looked like good footing outside of being a little loose. (R. 43) When he stepped on the clinker his foot turned, he was thrown off balance and his leg doubled under him and he sustained injuries. (R. 14) After the accident he saw the clinker with a hole right by its side. (R.. 44) It was partially kicked out of the cinders. (R. 61) It was about the size of his fist. (R. 14) He testified he did not know when it was placed in the roadbed or by whom. (R. 62)

Petitioner, a man with 25 years railroad experience and a former section hand, testified that it is not a customary practice to use clinkers the size of a man's fist in a railroad road bed. They don't pack down and give good footing. (R. 44) Lester Rector, Respondent's section foreman, who had charge of the Mount Olive track raising and new ballasting, said that such a large clinker would not belong in a road bed near a switch stand. (R. 77) Rector and Ed. Oelrichs, Respondent's track inspector, and John Brosnahan, Respondent's track supervisor, each testified that they inspected the house track once or twice a week (R. 74, 78, 84) Oelrichs' inspection was made from a motor car going 3 to 5 miles an hour. (R. 79) Brosnahan made his inspection from a motor car. (R. 84) They received no complaints of bad footing. (R. 75, 79, 80, 86) Brosnahan, testified that one purpose of ballast is to provide safe footing for trainmen. He stated that the presence of a clinker as described and located would represent an unsafe place to work. (R. 87) The cinders were not screened before being used in the new roadbed. (R. 77)

The site of the accident was the only place for Respondent's firemen to clean their fire boxes at Mount Olive. (R. 59)

Webb's statement taken by Respondent's claim agent in August, 1952, was admitted in evidence by agreement. It states in part:

> "I took one step and stepped on a cinder buried in the loose cinders about a foot from the end of the ties. When I stepped on this cinder it threw me off balance, caused me to fall and I injured my left knee as I fell. This happened about 15 feet south of the house track switch on the east side of the house track. This track had been worked on shortly before this by the trackmen and the cinders were stirred up and loose and this large cinder about six inches in circumference was buried in the loose cinders around it so that it was not discernible from the rest of the small loose cinders. It looked like the surface was level and good enough footing but this cinder being solid in the loose cinders caused my foot to turn as I stepped on it, turned my foot and caused me to fall so that I injured the cartilage in my knee as I fell." (P. Ex. 2, R. 65, 111)

The jury returned a verdict for petitioner in the sum of $15,000,00. Judgment was entered on the verdict.

Motions for new trial and for judgment notwithstanding the verdict were denied. (R. 128) On appeal, the Court of Appeals for the Seventh Circuit reversed the judgment and remanded the case to the District Court with directions to enter judgment for respondent. (R. 147) Petition for rehearing was denied. (R. 147)

SUMMARY OF ARGUMENT.

In the present case the jury could have found the following facts from the evidence:

1. Petitioner was injured by stepping on a large clinker buried near a switch stand in Respondent's roadbed.

2. About three weeks before this accident the area had been worked on by Respondent's section crews, the track and ties had been raised about five inches and the section crews in working two days had distributed about fifteen cubic yards of unscreened cinders and chat for new ballast.

3. The Respondent's firemen cleaned their fireboxes at this location.

4. The presence of a large buried clinker at the place described rendered the place unsafe for a switchman to perform his duties.

From these facts the jury could and did infer that respondent negligently failed to furnish petitioner with a reasonably safe place to work.

The Court of Appeals deprived the petitioner of his right to trial by jury when it reversed the judgment of the trial court and directed the entry of final judgment for the railroad.

The Court of Appeals in its opinion recognized that the Respondent may have placed the clinker in its roadbed as part of the ballast used in the repair operation, but said this was merely one of several possibilities present. It suggested that strangers or another railroad

may have been responsible for the presence of the clinker in Respondent's roadbed. It was in error when it decided that no probabilities could be deduced from the evidence and therefore the verdict was based on speculation and conjecture.

When fair-minded men can draw different conclusions from the evidence, the case is not one of law but of fact to be settled by the jury. *Myers* v. *Reading Co.*, 331 U.S. 477; It is the intent of Congress that to the maximum extent proper, questions in actions arising under the Federal Employers' Liability Act should be left to the jury. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54; and such cases may not be taken from the jury merely because the question of liability is close or doubtful, *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from a jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29.

In any case in which fair-minded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. It is not material that an Appellate Court may draw a contrary inference or feel that another conclusion is more reasonable. *Lavender* v. *Kurn*, 327 U.S. 645.

Under the liberal interpretation of the Federal Employers' Liability Act, as announced by this Court, the humanitarian intention evidenced by Congress in passing and amending the statute and the broad scope of the

jury's function as a fact-finding body, the Court of Appeals erred in directing the trial court to set aside the verdict of the jury and enter final judgment for the railroad.

It is important that the decision of the Court of Appeals be set aside because it is in conflict with the decisions of this Court. The opinion, if permitted to stand, will permit trial and appellate courts to weigh and evaluate evidence by measuring it in terms of "possibilities" and "probabilities" and thereby usurp the functions of the jury, contrary to the directions and admonitions of this Court and the intent of Congress.

ARGUMENT.

POINT I.

A plaintiff need not negate inferences of negligence of third persons in order to recover under the Federal Employers' Liability Act.

The Court of Appeals decision was based on the alleged failure of plaintiff to adduce evidence from which probabilities could be deduced. The Court stated that a possibility existed that the defendant placed the clinker in its roadbed as part of the ballast used in the repair operation but it noted that the tracks of another railroad were nearby, that the premises were unfenced and the record did not disclose whether the premises were frequented by strangers. (R. 144) It, therefore concluded that a finding that the defendant placed the clinker in its roadbed rested on conjecture and speculation.

Plaintiff contends that on the basis of probabilities the jury was justified in finding the issues in his favor. He earnestly maintains that irrespective of where the possibilities or the probabilities lay, from the viewpoint of the Court of Appeals, that Court had no right to weigh and evaluate the evidence or to classify it in the light of possibilities or probabilities and thus usurp the function of the jury.

Tennant v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 34, 35 (1944) is similar in several respects to the *Webb* case. The Court of Appeals for the Seventh Circuit in both cases held that there was no evidentiary basis for the jury verdict and said it was based on speculation and

conjecture. In the *Tennant* case the Court of Appeals outlined numerous ways, associated with non-negligence of the railroad, to explain the accident and indicated that it thought the most reasonable explanation for the death of the employee was that he seated himself upon an engine footboard, fell asleep and rolled to his death when the engine moved. In its opinion (134 F. 2d 860; 1943) the Court says at page 869:

> "We think we have sufficiently discussed the various theories as to the cause of decedent's death, particularly plaintiff's theory, to demonstrate that it is shrouded wholely within the realm of speculation and conjecture."

The Court goes on to cite *Patton* v. *T. & P. Ry. Co.*, 179 U.S. 658 (1900), as it does in the *Webb* case, to hold that where many causes may have brought about the injury, for some of which the employer might be liable and for others not responsible, then plaintiff has failed in his burden of proof.

The United States Supreme Court granted certiorari and reversed the Court of Appeals.

Speaking through Mr. Justice Murphy at pages 34 and 35, the Supreme Court said in the *Tennant* case:

> "In holding that there was no evidence upon which to base the jury's inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and

been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of direct proof as characterizes the one adopted by the jury. * * *

* * *

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witness, receives expert instruction, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

We respectfully submit that the Court of Appeals in the case now before the Court violated the clear mandate of this Court in searching the record for conflicting circumstantial evidence, *e. g.* the presence of tracks of another railroad or the possibility of access by strangers. It said, in effect, that the jury could not select from among conflicting inferences that which the jury thought most reasonable presumably because "there are no probabilities to be deduced from this evidence."

Even assuming that the proof did give equal support to inconsistent and uncertain inferences the case should have been decided by the jury.

The jury had the right, in view of plaintiff's positive testimony, to assume that the clinker was buried in defendant's roadbed. (R. 60, P. Ex. 2, R. 65, 111) The ballast was soft and left footprints. (R. 15) Fifteen cubic yards of unscreened cinders had been used in the repair job. (R. 77) This was the only place at Mt. Olive where defendant's firemen cleaned their fire boxes. (R. 59) The repair job preceded the accident by about three weeks. (R. 68) The inference that defendant's section hands failed to remove the clinker or placed it in the roadbed is not an unreasonable one; in fact it is the logical answer to its presence.

That the existence of the clinker made for an unsafe place to work is not a debatable issue. The plaintiff testified that a clinker did not belong in a roadbed near a switch (R. 44) and defendant's witnesses corroborated him. (R. 77, 87)

It is speculation and conjecture of the worst type to conclude or infer that a stranger or another railroad, with no plausible motive, would come on respondent's property and bury a clinker near its switch stand.

In *Lavender* v. *Kurn*, plaintiff's decedent was killed in an unwitnessed accident. Her theory was that the decedent was killed when struck on the head by a mail hook projecting from a backing train. The defendants contended that he had been murdered. Strangers frequented the premises, the mail hook showed no evidence of contact with a human body and there was evidence to show that it was physically and mathematically impossible for the hook to strike the decedent.

The Missouri Supreme Court reversed a jury verdict for plaintiff, 354 Mo. 196, 208; 189 S.W. 2d 253, 259 (1945) It said:

> "* * * it is well settled that a mere possibility of negligence is not a sufficient foundation for an inference of negligence which will justify submission of a case to a jury."

The United States Supreme Court (327 U.S. 645, 653, 1946) reversed the Missouri Supreme Court stating:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

In *Myers* v. *Reading Co.*, an experienced brakeman was injured due to the alleged defeetiveness of a railroad car handbrake. The jury found the issues in his favor and by special interrogatory found that the brake was not efficient.

The trial judge allowed defendant's motion for judgment *non obstante veredicto*. In its opinion 63 F. Supp. 817, 821 (E. D. Penn. 1945) it says:

> "From the paucity of proof offered by plaintiff the jury might logically draw the inference that the brake was inefficient and might just as logically have drawn the inference that the brake reacted normally and efficiently under the circumstances. Since the evidence supports equally two inconsistent inferences of fact it establishes neither. In this situation the jury should not have been permitted to draw conclusions from plaintiff's evidence regarding the inefficiency of the brake since their conclusion of necessity would have to be based on conjecture and speculation."

The trial judge was affirmed by the Court of Appeals for the Third Circuit in a *per curiam* opinion, 155 F. 2d 523 (1946).

The Supreme Court reversed the District Court and Court of Appeals, 331 U.S. 477, 484, 486 (1947), saying through Mr. Justice Burton:

> "While different conclusions might be possible, the jury, which heard the testimony and saw the petitioner's illustrations of handling the brake, reasonably could infer from that evidence that the condition of this brake and its actions were not those of an efficient hand brake."
>
> "We believe that the evidence given at the trial, with the inferences that the jury could reasonably draw from it, was sufficient to support the verdict originally rendered for petitioner."

The *Myers* case refers to *Spotts* v. *Baltimore & O. R. Co.*, 102 F. 2d 160, 162 (7 Cir. 1939). In that case the efficiency of a railroad brake was involved and the defendant urged on appeal that there was no substantial or probative evidence to support plaintiff's judgment. The Court of Appeals rejected this contention saying:

> "In other words, we cannot say as a matter of law that any and all inferences which the jury might reasonably draw from the evidence would support only a verdict for defendant and not for plaintiff. Nor can we say that, as a matter of law, the contradictory evidence offered by defendant shows that plaintiff's testimony cannot be true. A contention for such action is an appeal to us to weigh the conflicting evidence in the light of probabilities and thus to invade the exclusive province of the jury, and, on an application for a new trial, of the trial judge. This we may not do."

Stanczak v. *Pennsylvania R. Co.*, 174 F 2d 43, 46 (3 Cir., 1949), involved an unwitnessed death of a brakeman who was crushed between a box car and a loading platform. There was evidence of a defective caboose platform and proof that the edges of the loading platform were rough and uneven. The defendant contended that there was no evidence that its negligence or defective equipment caused the accident. The trial court (the same judge who tried this case) refused to direct a verdict for the defendant and his ruling was affirmed on appeal.

The Court of Appeals said:

> "In their effort to arrive at a solution of the problem as to how Stanczak came to be found in the position in which he was found between the platform and the boxcar the jury was not only required to resolve all disputed questions of fact but was permitted to draw reasonable inferences and make reasonable deductions from all the facts and circumstances surrounding the occurrence as shown by the evidence." *Wilkerson* v. *McCarthy*, 336 U.S. 53; *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649; *Tennant* v. *Peoria and P. U. Ry. Co.*, 321 U. S. 29; *Johnson* v. *Southwestern Engineering Co.*, 41 Cal. App. 2d 623, 107 P 2d 417.
>
> "There being evidence from which the jury may reasonably have inferred that Stanczak came to his death by one of the means suggested above and upon which to base a finding that such means involved negligence on the part of the appellant under the circumstances shown by the evidence, it is not within the function of this court to go back of the jury's verdict to consider other means not involving negligence on the part of appellant." *Lavender* v. *Kurn*, 327 U. S. 645, *Tillet* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350.

In *Henwood* v. *Coburn*, 165 F. 2d 418 (8 Cir. 1948) at page 423 the Court says:

> "In connection with what has been said, there is to be borne in mind also the apparent emphasis in the recent decisions of the Supreme Court that questions of negligence and proximate cause under the Federal Employers' Liability Act are generally for the jury; that the field of jury inference is a broad one and only requires a rational possibility on the facts; and that a verdict is not necessarily one of speculation and conjecture because inferences are arrived at by the application of general experience and common reaction to the evidentiary situation. See *Lavender* v. *Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. 649, 67 S. Ct. 598, 91 L. Ed. .....; *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1443."

POINT II.

The action of the Court of Appeals in searching the record for conflicting circumstantial evidence and directing entry of judgment for respondent deprived petitioner of his right of trial by jury contrary to the provisions of the Seventh Amendment to the United States Constitution.

The original F. E. L. A. statute of 1906 (34 Stat. 232) as repassed in 1908 (35 Stat. 65), abolished the fellow servant rule, substituted comparative negligence for the strict rule of contributory negligence and allowed survivor's actions for tort liability.

The 1939 amendments to the Act (53 Stat. 1404) abolished the defense of assumption of risk, extended the limitation period and broadened and clarified the duties of employees who were subject to the Act. The liberal and

humanitarian intention of Congress was evident from the legislation and the Supreme Court of the United States in a long line of cases evidenced its intention to protect the right of the injured employee to a jury trial and to place a liberal and humanitarian construction on the Act.

These cases include *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54 (1942); *Bailey* v. *Central Vermont Ry. Co.*, 319 U. S. 350 (1942); *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944); *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600 (1944); *Lavender* v. *Kurn*, 327 U. S. 645 (1946); *Ellis* v. *Union P. R. Co.*, 329 U. S. 649 (1947); *Myers* v. *Reading Co.*, 331 U. S. 477 (1947); *Wilkerson* v. *McCarthy*, 336 U. S. 53 (1948); *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407 (1953) and *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523 (1956).

Tiller v. *Atlantic Coast Line R. Co.* was an unwitnessed death case. It was before the Court on two occasions 318 U. S. 54, 68 (1943) and 328 U. S. 574 (1945).

In the first case, the footnote at page 68 states:

> "It appears to be the clear Congressional intent, that to the maximum extent proper, questions in actions arising under the Act should be left to the jury * * *."

In *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353 (1942), the Vermont Supreme Court reversed a trial Court and held that a directed verdict should have been granted. Bailey fell to his death while helping to unload a cinder car over a depressed cattle pass. The evidence showed a narrow bridge, no guard rail and other facts from which the jury could have inferred that the railroad did not furnish its employee with a safe place to work.

The Supreme Court speaking through Mr. Justice Douglas said at page 353:

"The debatable quality of that issue, the fact that fair minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. To withdraw such a function from the jury is to usurp its functions."

"The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In *Ellis* v. *Union P. R. Co.*, 329 U. S. 649, 653 (1947) an employee was crushed between a moving railroad car and a building. A trial court and jury were reversed by the Nebraska Supreme Court which held there was no evidence of negligence.

Certiorari was granted by the United States Supreme Court which analyzed the considered numerous ways in which the accident could have happened and reversed the Nebraska Supreme Court.

In the opinion, at page 653, the Court said:

"The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. Once there is a reasonable basis in the record for concluding there was negligence which caused the injury, it is irrelevant that fair

minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable."

In the early case of *Railroad Company* v. *Stout*, 17 Wall. 657, 663 (1873), Mr. Justice Hunt, speaking for the Court said:

"Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer, these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

In *Brown* v. *Western R. of Alabama*, 338 U. S. 294, 297 (1949), an employee's injury case was dismissed because it allegedly failed to state a cause of action against the defendant.

This Court reversed the Georgia Courts, saying at page 297, through Mr. Justice Black:

> "Other allegations need not be set out since the foregoing if proven would show an injury of the precise kind for which Congress has provided a recovery. These allegations, fairly construed, are much more than a charge that petitioner 'stepped on a large clinker lying alongside the track in the railroad yards.' They also charge that the railroad permitted clinkers and other debris to be left along the tracks, 'well knowing' that this was dangerous to workers; that petitioner was compelled to 'cross over' the clinkers and debris; that in doing so he fell and was injured; and that all this was in violation of the railroad's duty to furnish petitioner a reasonably safe place to work. Certainly these allegations are sufficient to permit introduction of evidence from which a jury might infer that petitioner's injuries were due to the railroad's negligence in failing to supply a reasonably safe place to work. *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 353. And we have already refused to set aside a judgment coming from the Georgia Courts where the jury was permitted to infer negligence from the presence of clinkers along the tracks in the railroad yard. *Southern R. Co.* v. *Puckett*, 244 U. S. 571, 574, affirming 16 Ga. App. 551, 554, 85 S. E. 809, 811."

Every essential element outlined in the *Brown* case is present in the *Webb* case or could have been reasonably inferred by the jury from the evidence which it heard.

The *Puckett* case, just cited, involved an employee tripping over three large clinkers on a roadbed.

This Court, affirming the trial court (244 U. S. 571; 1916), said at page 574:

> "It is contended that there was no sufficient ground for attributing negligence to defendant because of the presence of large clinkers in the path along which plaintiff, in the course of his duty was called upon to pass. This is no more than a question of fact, without exceptional features, and we content ourselves with announcing the conclusion that we see no reason for disturbing the result reached by two State Courts."

In *Waddell* v. *Chicago & E. I. R. Co.*, (7 Cir. 1944) 142 F. 2d 309, 310, plaintiff was injured when a railroad motor car was derailed at a public crossing. Plaintiff contended that defendant was negligent in permitting stones to exist between the planking and rails. The defendant contended that the condition, if it existed, was due to rocks recently lodged in the space of which it had no notice.

Defendant also stressed "the probability that the derailment was caused by a collision between the motor car and an automobile traveling on the highway."

The Court of Appeals said at page 310:

> "There is no direct proof in support of this theory. It must be admitted, we think, that the circumstances create a strong suspicion that such might have been the case. Plaintiff, however, expressly denied that his car had collided with an automobile, which testimony, if believed by the jury eliminated a collision as the cause of the derailment. At any rate, this contention presents merely another aspect of the case which the jury no doubt considered and decided adversely to defendant's contention.
>
> While a study of this record creates doubt, as to the correctness of the results reached in the court below, we are compelled, so we think, to decide that

a jury question was presented, and it follows that the court did not err in its refusal to direct a verdict."

McClain v. *Charleston & W. C. Ry. Co.*, 191 S.C. 332; 4 S. E. 2d 280 (S. C. Sup. 1939), is a case strikingly in point. A station agent suffered a fall in a railroad yard, in a concealed hole in the roadbed. The proof showed that a repair job on the ties had been completed from four days to a week before. The roadbed "looked smooth and all right." The place that she stepped on seemed to be a regular hole and her foot went down and struck a rock which was concealed in the soft dirt. The upper court reversed a trial court which had directed a verdict against the plaintiff holding a question of fact existed for the jury on the safe place to work issue.

The Court of Appeals in the *Webb* case erred in another respect in its opinion and judgment.

In its opinion that Court says: (R. 144)

"* * * plaintiff still would not be entitled to recovery unless it was allowed also to speculate that it is negligence per se to allow such an object to become mixed in with the fine ballast used in improving its roadbed."

We refer the Court to page 87 of the Record where defendant's track supervisor was being cross-examined:

"Q. I believe you stated the various purposes of ballast. Let me ask you, Mr. Brosnahan, if one of them is not to afford safe footing for trainmen whose duties require them to work in or about switch stands?

A. Yes, sir.

Q. In your opinion, Mr. Brosnahan, would the presence, if it existed, of a clinker the size of a man's fist imbedded in the cinders, adjacent to a switch stand, represent a safe place for a trainman to work?

A. No, sir."

Defendant's witness, Lester Rector, the foreman of the Mt. Olive repair job was cross-examined by petitioner's counsel.

At page 77 of the Record appears:

> "Q. I believe you stated, Mr. Rector, that you would not use a large clinker in the ballast near a switch stand, is that right?
> A. That is right, I would not.
>
> Q. Would you use ballast with clinkers the size of a man's fist?
> A. No, sir.
>
> Q. That would not belong in the roadbed near a switch stand, would it, Mr. Rector?
> A. No, sir."

Petitioner testified it is not the custom and practice to use a clinker as described because

> "it doesn't pack down; it doesn't give good footing; and it cannot be tamped in under the ties for support." (R. 44)

This positive and uncontradicted testimony made an issue of fact for the jury to determine as to whether or not a safe place to work was provided by the respondent.

In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 61 (1948), it is said:

> "But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the circumstances. And a jury should hold a master liable for injuries attributable to conditions under his

control when they are not such as a reasonable man ought to maintain in the circumstances bearing in mind that 'the standard of care must be commensurate to the dangers of the business'."

Schulz, Administrator v. *Pennsylvania R. Co.*, 350 U. S. 523, 525, 526, decided by this Court on April 9, 1956, states:

"In considering the scope of issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre, but measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 445 (1888)."

Near its conclusion the opinion holds:

"Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

Gardner v. *Michigan Central Railroad Co.*, 150 U. S. 349, 361 (1893) holds that:

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusions from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. *Railway Co.* v. *Ives*, 144 U. S. 408, 417; *Railway Co.* v. *Cox*, 145 U. S. 593, 606; *Railway Co.* v. *Miller*, 25 Mich. 274; *Sodowski* v. *Car Co.*, 84 Mich. 100."

In *Texas & Pacific R. Co.* v. *Cox*, 145 U. S. 593 (1892) at page 606 Chief Justice Fuller says:

"The case should not have been withdrawn from the jury unless the conclusion followed as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." (citations).

The jury had before it sufficient probative facts to sustain its verdict for petitioner. The Court of Appeals deprived him of his constitutional right to a trial by jury when it reversed the trial court judgment and the verdict of the jury and directed entry of final judgment for the railroad.

POINT III.

Petitioner was not obligated to prove notice by respondent of a defective condition created by respondent in its own roadbed.

The respondent in its brief in opposition to the petition for writ of certiorari set forth two questions for review. These questions are printed on pages two and three of this brief.

They ask this Court to determine whether or not plaintiff had the burden of producing probative evidence of

defendant's knowledge of the clinker in its roadbed and to determine if the Court of Appeals had the right to reverse the trial court judgment and direct entry of judgment for defendant in the absence of such proof.

The statute in question (35 Stat. 65, 45 U. S. C. 51) quoted on page 3, provides that the railroad shall be liable in damages to an employee who suffers injury resulting by reason of the negligence of any agents or employees of the carrier or any defect or insufficiency due to its negligence in its track or roadbed.

Since the employer acts through its employees, their wrongful acts or neglect is its tort.

Plaintiff's theory from the time of the filing of his complaint (R. 4) to the conclusion of the trial was that defendant undertook to make repairs in its roadbed and track, did so in a negligent manner and that he was injured thereby.

The Court of Appeals recognized this when it said:

> "But to prevail, it was incumbent on plaintiff to adduce evidence that the hazardous condition was produced or permitted to continue by reason of defendant's negligence.". (R. 142)

It would be an injustice to require proof that defendant knew of its own negligent act and in most cases an impossible task.

In *Sears, Roebuck & Co.* v. *Peterson,* 76 F. 2d 243, 246 (8 Cir. 1935), plaintiff tripped on a piece of twine on the floor of defendant's store and recovered judgment. On appeal, the defendant contended that there was no proof that it had knowledge of the twine upon the floor.

The Court of Appeals rejected this contention saying:

> "This is not a case in which the condition was attributable either to the elements or the act of some third party. The negligence here complained of was that of defendant itself, committed, it is true, by the employee. It would be an anomaly to hold that one is not to be charged with notice of a condition arising from his own active negligent act, or that there must be proof of knowledge or notice of a dangerous condition created by the negligent act or omission of the owner of the premises."

The jury was presented with evidence from which it could reasonably conclude that the plaintiff was injured through defendant's negligence, and plaintiff was not required to show that the tort-feasor had knowledge of its wrongful conduct.

CONCLUSION.

Petitioner respectfully submits that the judgment of the court below should be reversed and the judgment of the trial court affirmed.

Respectfully submitted,

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